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IN THE

Supreme Court of The United States

October Term, 1963

No. 515

HEART OF ATLANTA MOTEL, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA

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TOPICAL INDEX

	Page
STATEMENT OF THE CASE	2, 3
SPECIFICATION OF POINTS INVOLVED	3, 4
SUMMARY OF THE ARGUMENT	4, 5, 6
FEDERAL CIVIL RIGHTS ACT OF 1964	6-11
CONSTITUTIONAL PROVISIONS	11-13
ARGUMENT	13-36

TABLE OF CITATIONS

A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. text 50	28
Buchanan v. Warley, 245 U. S. 60, text 77, 38 S. Ct. 1570, text 1587	15
Burton v. Wilmington Parking Authority, 365 U. S. 715, text 50, 81 S. Ct. 865, 6 L. ed. 2d. 45, text 50	17
Carter v. Carter Coal Company, 298 U. S. 238, text 297, 56 S. Ct. 855, 80 L. ed. 1160, text 1182	23
56 S. Ct. 855, 80 L. ed. 1160, text 1188	26, 28
Cooper v. Aaron, 358 U. S. 1, text 17 and 18, 78 S. Ct. 1401, 3 L. ed. 2d. 5, text 16	17
Maxwell v. Dow 170 U. S. 581, text 593, 20 S. Ct. 448, 44 L. ed. 597, text 601	16

Nixon v. Herndon, 237 U. S. 536, text 541, 47 S. Ct. 446, 71 L. ed. 759, text 761 15

Packer Corporation v. Utah, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643, text 648 32

Pacific States Box and Basket Company v. White, 296 U. S. 176, text 184, 56 S. Ct. 159, 80 L. ed. 138, text 145 31

Peterson v. Greenville, 373 U. S. 244, text 247, 83 S. Ct. 1119, 10 L. ed. 2d. 323 17

Rice v. Sioux City Cemetery, 349 U. S. 70, text 72, 75 S. Ct. 614, 99 L. Ed. 897 16

Rubber Tire Wheel Company v. Goodyear Tire and Rubber Company, 232 U. S. 413, text 419, 34 S. Ct. 403, 58 L. ed. 663, text 667 30

Slaughter House cases, 83 U. S. 36, text 73, 21 L. ed. 394, text 407 and 408 16

United States v. Yellow Cab Company, 332 U. S. 218, text 230 and 231, 67 S. Ct. 1560, 91 L. ed. 2010, text 2020 29

Wabash Railroad Company v. Pearce, 192 U. S. 179, text 188, 24 S. Ct. 231, 48 L. ed. 397, text 400 26

Weigle v. Curtice Brothers Company, 248 U. S. 285, text 286-288, 39 S. Ct. 124, 63 L. ed. 242, text 249 and 250 31

UNITED STATES CONSTITUTION

ARTICLE I, Section 8	3, 12, 18, 19, 22, 23
FIFTH AMENDMENT	12
TENTH AMENDMENT	12
(FIRST TEN AMENDMENTS—BILL OF RIGHTS)	13
FOURTEENTH AMENDMENT	4, 11, 14, 17, 18, 23, 34

STATUTES

Public Law 88-352; 78 Stat. 241, et seq.	
Title II, 201-207	
TITLE III, 301-304	3, 4, 7, 8, 9, 19, 21, 33
(Civil Rights Act of 1964)	

TEXTS

11 American Jurisprudence 18, section 17	26
11 American Jurisprudence 1098, section 311	15
12 American Jurisprudence 128, section 468	15

12 American Jurisprudence 133-134, section 471 — 15

15 American Jurisprudence 2d. 647 and 648, section 17 — 27, 28

15 American Jurisprudence 2d. 702 and 703, section 59 — 27

15 Corpus Juris Secundum, 290 and 291, section 25 — 25

16A Corpus Juris Secundum, 307 and 308, section 505 — 15

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STATEMENT OF THE CASE

In this case, the petitioner, the Heart of Atlanta Motel, Inc., a corporation, owns and operates a large motel and restaurant business on Courtland Street in the City of Atlanta, Georgia, the same being located some two blocks from downtown Peachtree Street in said Atlanta, Georgia, readily available to travelers traveling over United States Highways 23 and 41 as well as Interstate Highways 75 and 85. This appears to be a large motel having available for transit occupancy probably two hundred or more rooms, as well as a restaurant and lounge available for the use of their customers and maybe others. It is here presumed that among the motel, restaurant and lounge customers there are interstate customers and travelers; however, we are not advised of the ratio of such interstate customers to the intrastate customers.

Doubtless equipment articles, including beds and bedding, room furnishing, towels, washrags and other items used in the operation of the motel were at one time in interstate movement, either as finished products, or materials subsequently used in the manufacture or preparation of such equipment; however, we are of the opinion that such equipment articles and products used, or to be used in their manufacture or preparation, had ceased to be articles of interstate or foreign commerce before being put to use in connection with the operation and maintenance of the said motel.

Doubtless many items of food and other products, used in the preparation of the food and other products, actually

sold and served in the restaurant and lounge to customers thereof had, prior to being so sold and served, passed through interstate or foreign commerce, but had ceased to be articles of commerce before being sold and delivered to customers of the said restaurant and lounge for consumption as customers thereof.

It appears that the said owners and operators of the said Heart of Atlanta Motel and its restaurant and lounge have refused to rent to certain persons or classes of persons motel accommodations in the said motel, or to serve such persons or classes of persons in its restaurant and lounge, which refusal is deemed by the United States to be violative of Title II of the Civil Rights Act of 1964 of the United States (Public Law 88-352; 78 Stat. 241). This refusal seems to put in issue the validity and constitutionality of the provisions of sections 201 - 207, Title II, of said Public Law 88-352, as well as sections 301 - 304, Title III, of said Public Law 88-352, which seems to involve a construction of said Public Law 88-352 and section 8, Article I, of the United States Constitution, insofar as the same relate to commerce, and the Fourteenth Amendment to the United States Constitution.

SPECIFICATION OF POINTS INVOLVED

The following questions appear to be here presented for review and determination:

1. ARE THE PROVISIONS OF TITLES II AND III OF PUBLIC LAW 88-352, ACTS OF 1964 (78

Stat. 241, et seq.) PROHIBITING DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATIONS BY THE OPERATORS OF SUCH PLACES, VALID AND CONSTITUTIONAL UNDER THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

2. ARE THE PROVISIONS OF SAID TITLES II AND III OF SAID PUBLIC LAW 88-352, RELATING TO DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION BY THE OPERATORS OF SUCH PLACES, VALID AND CONSTITUTIONAL UNDER THE PROVISIONS OF SECTION 8, ARTICLE I, OF THE UNITED STATES CONSTITUTION, RELATING TO COMMERCE WITH FOREIGN NATIONS, AMONG THE STATES AND WITH INDIAN TRIBES?

SUMMARY OF THE ARGUMENT

This litigation involves the validity of the public accommodations provision in the Civil Rights Act of 1964 (Public Law 88-352; 78 Stat. 241) under the commerce clause and the Fourteenth Amendment of the United States Constitution, as applied to a motel, restaurant and lounge in Atlanta, Georgia, not operated in connection with a railroad, bus line, air line, or other transportation facility operating interstate, but which may incidentally and from time to time serve an interstate traveler, and which may also use in the preparation of food for service

in its restaurant food products which may have prior to receipt by the restaurant moved in the stream of interstate commerce.

Under the Fourteenth Amendment to the United States Constitution, its operation is against state, and not individual and corporate action. The said public accommodations provisions of the said Civil Rights Act of 1964 are directed against individual and corporate action, by the owners and operators of places of public accommodation, and not against state action. It is Florida's contention that the public accommodations provisions of the said Civil Rights Act of 1964, being directed against individual and corporate action, and not state action, are invalid and unauthorized and not within the purview of the said Fourteenth Amendment to the Constitution of the United States.

There being no showing that the Heart of Atlanta Motel, Inc., a corporation, is actively engaged in interstate commerce, its connection with such commerce being, at the most, only incidental and not direct, consisting in the renting of a room to an interstate traveler on some occasions, but then unconnected with any business having a direct connection with interstate commerce, and the serving of foods prepared by it from food products that may have moved in interstate commerce prior to its purchase for such purpose, and prior to the time it was purchased and used for such preparation of foods for service in its restaurant. It seems evident from the record in this case that such interstate commerce terminated and came

to an end prior to the use of such food products in the preparation of the said food and prior to the time such food was served to the restaurant customers. Interstate commerce having terminated prior to the sale and service of the food to the customer, there is nothing to support the application of the Civil Rights Act to the service of food in restaurants and other places of accommodation not bearing a direct and specific connection with interstate commerce. In connection with the sale of gasoline and other products to motor vehicle owners, by dealers in such gasoline and other products, any interstate movements of the said products come to an end prior to the actual sale of the same, so that such sales are not sales having a direct connection with such commerce. This being true, the provisions of the said Civil Rights Act of 1964, are not supported by the said commerce clause of the United States Constitution, and are therefore invalid as applied to such sales.

FEDERAL CIVIL RIGHTS ACT OF 1964

The second session of the 88th Congress of the United States enacted House Resolution 7152 of that session and sent the same to the President of the United States who, on July 2, 1964, approved the same and it became a law now designated as Public Law 88-352 (78 Stat. et seq.) which statute has become effective as to many portions thereof, including the portion thereof relating to Places of Public Accommodation. Title II of said Public Law 88-352 relates to discrimination in Places of Public Accommodation, subsection (a) of section 201 of said act defines *the General Application of said title*, providing that:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

Places of public accommodation, within the purview and operation, are defined in paragraph (b) of section 201 of said Public Law 88-352, as follows:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment: (A)

(i) which is physically located within the premises of any establishment otherwise covered by this subsection; or

(ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

The conditions under which the operation of such public accommodations affect interstate commerce are defined in paragraph (c) of said section 201 of said Public Law 88-352, said paragraph being as follows:

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b) it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce;

(3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises an establishment the operations of which affect commerce within the meaning of this subsection.

For purposes of this section 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same state but through any other State or the District of Columbia or a foreign country.

The circumstances when discrimination and segregation are deemed to be supported by State action, are defined and set out in paragraph (d) of said Section 201, of said Public Law 88-352, said paragraph being as follows:

"(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation

(1) is carried on under color of any law, statute, ordinance, or regulation; or

(2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or

(3) is required by action of the State or political subdivision thereof."

Certain limited exceptions and conditions are made to and from the said Federal Civil Rights Act of 1964 by paragraph (e) of section 201 thereof, said paragraph being as follows:

"(e) The provisions of this title (Title II) shall not apply to private clubs or other establishments not in fact open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons of an establishment within the scope of subsection (b)."

The following other provisions and portions of said Public Law 88-352, the same being the Federal Civil Rights Act of 1964, may have some bearing on the questions herein considered and discussed, to wit:

Section 202 of said Federal Civil Rights Act of 1964 is as follows:

"All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation

is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."

Section 203 *of said Federal Civil Rights Act of* 1964 is as follows:

"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

CONSTITUTIONAL PROVISIONS

Section 1 *of the Fourteenth Amendment* to the Constitution of the United States provides, insofar as here material, that:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

2. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

3. No State shall deprive any person of life, liberty or property, without due process of law;

4. Or deny to any person within its jurisdiction the equal protection of the laws.

5. Congress is vested with power to enforce, by appropriate legislation, the above-mentioned provisions.

Under the above constitutional provisions all persons, regardless of race, color, creed or previous condition of servitude, who were born in the United States, are citizens of the United States and of the state wherein they reside, and are entitled to same legal privileges, immunities and protection as are other such citizens of the United States.

Under Section 8, Article I, of the United States Constitution, Congress is vested with power to provide for the General Welfare of the United States (clause 1), to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes (clause 3), and to carry such powers into execution (clause 18).

The Fifth Amendment to the Constitution of the United States provides, insofar as here material, that no person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Tenth Amendment to the Constitution of the United States provides that "the powers not delegated to

the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."

"*The first ten amendments to the federal constitution,* commonly known as the 'bill of rights', guaranteeing protection to certain rights of the people, do not apply to the states, but constitute limitations on the power of the federal government only, and are not grants of power." (16 C. J. S. 185 and 186, section 69). The provisions in the Fourteenth Amendment to the United States Constitution, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," was doubtless designed to give the people of the several states and of the United States the same protection from state action as was given the people of the several states and of the United States against federal action by the Fifth Amendment above-mentioned. Neither the United States nor the states may deprive any person of life, liberty or property without due process of law or deny to any person within their jurisdiction the equal protection of the laws.

ARGUMENT

FIRST QUESTION:

ARE THE PROVISIONS OF TITLES II AND III OF PUBLIC LAW 88-352, ACTS OF 1964 (78 Stat. 241, et seq.) PROHIBITING DISCRIMINATION IN

PLACES OF PUBLIC ACCOMMODATIONS BY THE OPERATORS OF SUCH PLACES, VALID AND CONSTITUTIONAL UNDER THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSITUTION OF THE UNITED STATES?

Section 1 of the Fourteenth Amendment to the Constitution of the United States, is divided into two separate sentences. *First* is the declaration that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside." This declaration does not seem to require legislation to make the same effective. So far as we are advised no definition of citizenship was previously found in the Constitution of the United States, nor had any attempt been made by Congress to define it. *Second,* there are the declarations that (a) *no state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, (b) *no state* shall deprive any person of life, liberty or property, without due process of law, and that *no state* shall deny to any person within its jurisdiction the equal protection of the laws. The prohibitions here are against the states, not against persons, firms and corporations. The prohibitions of this amendment are restrictions on state action, not restrictions on personal or corporate action. Here *the discrimination in a place of public accommodation* charged against the Heart of Atlanta Motel, Inc., a corporation, is not the result of state action, but of the action by a corporation by and through its officers and agents. The attempted enforcement is against the Heart of Atlanta Motel,

Inc., and not against the State of Georgia or its agency. The discrimination has been brought about by the act of a person, firm or corporation, and not the act of the State or its agent.

It is stated in 16A C. J. S. 307 *and* 308, *section* 505, *that* "the Fourteenth Amendment applies only to action by a state government. It does not apply to action by Congress, or action by a territory of the United States, *an individual or private corporation*, although within its application, may not infringe or violate it." (Emphasis supplied). See also 11 Am. Jur. 1098, section 311; 12 Am. Jur. 128, section 468; 12 Am. Jur. 133-134, section 471. Here we are concerned primarily with the application of the recent federal civil rights legislation designed to prevent discrimination and segregation of citizens of the United States, with the aid of state legislation in some cases, on account of race, color, religion or national origin.

The Supreme Court of the United States in *Nixon v. Herndon*, 273 U. S. 536, text 541, 47 S. Ct. 446, 71 L. ed. 759, text 761, speaking through Mr. Justice Holmes, said that the Fourteenth Amendment, "While it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them." In this case the court, quoting from *Buchanan v. Warley*, 245 U. S. 60, text 77, 38 S. Ct. 16, 2 L. ed. 149, text 161, said that the said Fourteenth Amendment "not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws . . . What is this but de-

claring that the law in the states shall be the same for the black as well as the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them *by law because of their color.*" (Emphasis supplied). *In Maxwell v. Dow,* 170 U. S. 581, text 593, 20 S. Ct. 448, 44 L. ed. 597, text 601, the Court remarked that "the primary reason for that (fourteenth) amendment was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to everyone, white or black, that comes within its provisions." *In the Slaughter-House cases,* 83 U. S. 36, text 73, 21 L. ed. 394, text 407 and 408, the Court stated that the main purpose of the Fourteenth Amendment "was to establish the citizenship of the negro can admit of no doubt." In this case (83 U. S. text 81, 21 L. ed. text 410) the Court further remarked that "the existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by which such laws are forbidden." All of these cases were decided prior to January 1, 1938; this being true, no Justice of the Supreme Court sitting today took part in any of them.

In Rice v. Sioux City Cemetery, 349 U. S. 70, text 72, 75 S. Ct. 614, 99 L. ed. 897, the Court remarked that "only if a state deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment

can its protection be invoked." *In Peterson v. Greenville*, 373, U. S. 244, text 247, 83 S. Ct. 1119, 10 L. ed. 2d. 323, text 326, the Court said that "it cannot be disputed that under our decisions 'private conduct abridging individual rights does not violate the equal protection clause unless to some significant extent the state in any of its manifestations has found to have become involved in it.'" *In Burton v. Wilmington Parking Authority*, 365 U. S. 715, text 50, 81 S. Ct. 865, 6 L. ed. 2d. 45, text 50, the Court, quoting from the Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835, stated that "the action inhibited by the first section (equal protection clause) of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful . . . that private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it . . ." To the same general effect see also *Cooper v. Aaron*, 358 U. S. 1, text 17 and 18, 78 S. Ct. 1401, 3 L. ed. 2d. 5, text 16.

From the above and foregoing it appears that the Fourteenth Amendment to the Constitution of the United States deals with State and not individual action. Under this amendment *no state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; deprive any person of life, liberty or property without due process of law, or deny any person within its jurisdiction the equal protection of the law.

These prohibitions are against the several states, *not against the citizens and residents* themselves. Disregarding for the present the effect of the commerce clause of the United States Constitution, (paragraph 3, section 8, Article I, of the United States Constitution) the United States Constitution does not prohibit the operation of a business facility by a person, firm or corporation, wherein there is discrimination or segregation of patrons or customers based on race, color, religion or national origin. However, the state and its officers are prohibited by the said Fourteenth Amendment from enforcing or assisting in the enforcement of such discrimination or segregation. Such owners of such business facilities would be unable to call upon the public officers of the state, county or municipality to assist them in the enforcement of such discrimination or segregation. The acts here complained of as producing discrimination or segregation, or both, are action by the owners of the motel, restaurant and lounge, not action by the State of Georgia or under its authority. The action alleged in this case to produce discrimination or segregation, or both, is action by persons, firms or corporations, not action by the State of Georgia or under its authority. No showing is made in this case that the State of Georgia has made, or is enforcing, any law which abridges or adversely affects the privileges or immunities of citizens of the United States, or is depriving any person of life, liberty, or property without due process of law.

SECOND QUESTION:

ARE THE PROVISIONS OF SAID TITLES II AND

III OF SAID PUBLIC LAW 88-352, RELATING TO DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION BY THE OPERATORS OF SUCH PLACES, VALID AND CONSTITUTIONAL UNDER THE PROVISIONS OF SECTION 8, ARTICLE I, OF THE UNITED STATES CONSTITUTION RELATING TO COMMERCE WITH FOREIGN NATIONS, AMONG THE STATES AND WITH INDIAN TRIBES?

Section 8, *Article I, of the United States Constitution,* insofar as it relates to commerce is as follows:

> "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states and with the Indian tribes . . . and; To make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . "

Section 1 *of the Fourteenth Amendment* to the United States Constitution provides that *no state*

> "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

These constitutional provisions appear to have been the basis for subsections (b) and (c) of Section 201 of Public

Law 88-352 of the United States, which subsections provide as follows:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title *if its operations affect commerce*, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel or other establishment which provides lodging to *transient guests* other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged *in selling food for consumption on the premises*, including but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theatre, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically loc ted any such covered establishment, and (B) which holds itself

out as serving patrons of such covered establishment. (C) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country. (Emphasis supplied).

From the above quoted portion of said section 201 of Public Law 88-352 it appears that said paragraphs (b) and (c) of said section 201, and their operation, are de-

pendent upon *operation under and within the commerce clause* of the United States Constitution, or upon discrimination or segregation *supported by state action so as to be within the Fourteenth Amendment*. The application and operation of the Fourteenth Amendment was discussed in our first question above, which will not be repeated here.

Where places of public accommodation are located in airports, bus stations, railroad stations, and the like, and are primarily engaged in furnishing accommodations to persons traveling on aircraft, trains, busses, and like and similar means of transportation, it appears, from cases cited in note 164 of the annotations to Clause 3, Section 8, Article I, of the United States Constitution, prepared and published by the West Publishing Company and Edward Thompson Company, under the title of United States Code Annotated, that such accommodations become a part of such transportation so as to be part and parcel thereof so as to become a part of interstate commerce carried on by such aircraft, trains, busses and the like as means of interstate transportation and commerce. Here the motel, restaurant and other public facilities do not appear to be used as part and parcel of any such means of transportation or as an adjunct thereto, such as a restaurant operated in a railroad, bus, or air terminal.

We come next to the question of whether places of public accommodation, selling or serving gasoline or other motor fuels, preparing and serving meals, or selling commodities, which prior to such selling or serving had moved

in interstate commerce into the state to dealers within the state, who had in turn sold and delivered the same to such places of public accommodation, to be used for sale as aforesaid, are themselves engaged in interstate commerce so as to bring them within the purview of said clause 3, section 8, Article I, of the United States Constitution. For example, is Morrison's Cafeteria, located in Tallahassee, Florida, within said clause 3, Section 8, Article I, of the United States Constitution, merely because it uses groceries, meats, and other food products that were moved in interstate commerce, prior to their sale and delivery to the said cafeteria, in the preparation of their food and food products to be sold to customers in said cafeteria in Tallahassee, Florida. Stated in another way, does the Congress of the United States, under the power vested in it by said clause 3, Section 8, Article I, of the United States Constitution, "to regulate commerce . . . among the several states . . . ," have authority to regulate the sale of such food by the said cafeteria, including the persons to whom such sales must be made.

The Court, in *Carter v. Carter Coal Company,* 298 U. S. 238, text 297, 56 S. Ct. 855, 80 L. ed. 1160, text 1182, concerning the said commerce clause of the United States Constitution, said that "in exercising the authority conferred by this clause of the Constitution, *Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation* . . . the power to regulate commerce embraces the instruments by which commerce is carried on." This poses the question of whether or not Morrison's Cafeteria,

in Tallahassee, Florida, is an instrumentality by which commerce is carried on "among the several states," or two or more of them, including Florida, as well as other service stations throughout the state and nation, purchase the gasoline, oil and other petroleum products sold by them, from distributors or wholesalers, who procure their supplies of gasoline, oil and other petroleum products from manufacturers located in other states and countries, the same moving in foreign or interstate commerce into Florida, before being sold by service stations to their customers. This poses the question of whether or not each such service station in Florida selling gasoline, oil and other petroleum products, is an instrumentality by which commerce is carried on "among the several states," or two or more of them, including Florida. Other examples may also be given to illustrate like transactions.

Even should we admit that the food products from which the meals served by Morrison's Cafeteria, in Tallahassee, Florida, were prepared and served, moved interstate before coming to rest in the cafeteria warehouse or kitchen, and that the gasoline, oil and petroleum products sold by service stations in Tallahassee, Florida, as well as elsewhere, moved interstate before coming to rest in the service station, service tanks and containers from which they were sold by the said service stations, we are confronted with the question of when did interstate commerce, or foreign commerce, as the case may be, cease and terminate; and whether or not the food sales by the cafeteria, and the gasoline, oil and other petroleum products sold by the service stations, were made in interstate commerce.

When does the interstate transportation of the food products, and the gasoline, oil and other petroleum products above-mentioned, begin and when does it terminate and come to rest? "Commerce begins when the movement of the product is actually begun. The mere intention of the shipper ultimately to send some of the goods beyond the state line does not in itself put them in interstate commerce, nor does preparatory gathering for that purpose at a depot or yard constitute interstate commerce . . . , however, transportation begins when the merchandise has been placed in possession of a common carrier . . . " (15 C. J. S. 290 and 291, section 25). We are here concerned with the termination of the interstate movement of the food products and the gasoline, oil and other petroleum products above-mentioned, and whether such interstate movement terminates prior to the sale of the food and food products by the cafeteria to its customers; and whether prior to the sale of the gasoline, oil and other petroleum products to motorists. We here use the sale of the food products by the cafeteria, and of the gasoline, oil and petroleum products as examples to illustrate the problem before us; many other products sold at retail may also be used.

For the purpose of this brief we will not concern ourself with the effect of breaks in commerce prior to the time the property moving in commerce comes to rest at its destination. Our primary concern is when the commerce, be it interstate or foreign, comes to rest and is no longer an item of commerce. "The regulatory power of Congress over interstate and foreign commerce does not attach until such intercourse begins, and, conversely, the

power of Congress ceases when interstate or foreign commercial intercourse ends." (11 Am. Jur. 18, section 17, Carter v. Carter Coal Company, 298 U. S. 238, text 309, 56 S. Ct. 855, 80 L. ed. 1160, text 1188; Wabash Railroad Company v. Pearce, 192 U. S. 179, text 188, 24 S. Ct. 231, 48 L. ed. 397, text 400). In 15 Am. Jur. 2d. 701 and 702, section 59, it is stated that:

> "Interstate commerce ordinarily continues as such until it reaches the point where the parties originally intended that the movement should finally end. In other words, transportation usually is not complete until the shipment arrives at the point of destination and is there delivered. In addition, the return trip of an empty truck after delivery of a load in interstate commerce is incidental to its operations in interstate commerce.
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> "The interstate character of a shipment of goods terminates when it is delivered to a warehouse to be held until called for by the shipper, or by the buyer who ordered the goods but has the option of rejecting them, or, in the case of oil, when it is delivered to storage tanks for distribution to various points within the state, where the ultimate destination of the oil was not known when it was delivered into the storage tanks. Where gas is transported from another state, the interstate movement ends with the delivery of the gas to distributing companies; its subsequent sale

and delivery by these companies to their customers at retail are intrastate commerce, which is subject to state regulation. But the essential nature of the transportation of natural gas in pipelines into a state is not affected by the particular point at which, without arresting the movement of the gas to its intended destination, the title and custody of the gas passes to the purchasers."

In 15 Am. Jur. 2d 647 and 648, section 17, it is stated that:

"The powers over commerce not delegated to the federal government by the Constitution are reserved to the states. Thus, while the regulation of foreign and interstate commerce is exclusively within the power of Congress, the states retain exclusive control over that commerce which is completely internal, which is carried on between one person and another in a state, and which does not extend to or affect other states. As to such commerce, the states have plenary power and Congress has no right to interfere. A state law may not be struck down on the mere showing that its administration affects interstate commerce in some purely incidental way. State regulations otherwise valid cannot be attacked merely because they incidentally affect business activities carried on outside the state. And when the legislation of the state

is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may have some effect, which is neither direct nor substantial, on interstate commerce. Furthermore, a state may, in a proper case, regulate the intrastate activities of an instrumentality which is employed both in intrastate and interstate commerce."

"The regulatory power of Congress over interstate and foreign commerce does not attach until such intercourse begins, and, conversely, the power of Congress ceases when interstate or foreign commercial intercourse ends." (15 Am. Jur. 2d. 646, section 16). Articles of interstate commerce are not, because of their origin, entitled to permanent immunity from the exercise of state regulatory power, and when, by reason of the fact that interstate transportation has terminated, objects come within the sphere of state legislation, the state may exercise its independent judgment and prohibit that which Congress did not see fit to forbid." (15 Am. Jur. 2d. 648, section 17). In Carter v. Carter Coal Company, 298 U. S. 238, text 309, 56 S. Ct. 855, 80 L. ed. 1160, text 1188, this Court said, concerning the commerce clause of the federal constitution, that "the federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins." In A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570, text 1587, the poultry corporation trucked live poultry from outside of the state to its slaughterhouse mar-

kets in New York where it held the same at its said slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. "Neither the slaughtering nor the sales by defendants were transactions in interstate commerce." Evidently they were intrastate transactions. The said opinion continues stating that the facts "afford no warrant for the argument that the poultry handled by the defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation."

In United States v. Yellow Cab Company, 332 U. S. 218, text 230 and 231, 67 S. Ct. 1560, 91 L. ed. 2010, text 2020, the Yellow Cab Company was engaged in the business of transporting persons by yellow cabs from the railroad stations in Chicago to their homes, offices, hotels, etc., and vice versa, when such persons had come into such railroad stations in many instances from other states. The question before this Court appears to have been whether or not the transportation of such persons from other states was continued by reason of the transportation thereof from the railroad stations to their homes, offices, hotels, etc., constituted a part of the interstate commerce commenced in other states. This Court held not, stating:

> "We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly

cross no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental."

"All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation. And a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act."

In Rubber Tire Wheel Company v. Goodyear Tire and Rubber Company, 232 U. S. 413, text 419, 34 S. Ct. 403, 58 L. ed. 663, text 667, in a patent infringement case, it was stated that the patented article "continues only so long as the commodity to which the right applies retains a separate identity. If that commodity is combined with other things in the process of the manufacture of a new commodity, the trade right in the original part as an article of commerce is necessarily gone, so that when other persons become manufacturers on their own behalf, assembling the various elements and uniting them so as to produce the patented device, a new article" is produced.

In Weigle v. Curtice Brothers Company, 248 U. S. 285, text 286-288, 39 S. Ct. 124, 63 L. ed. 242, text 249 and 250, it was held that the commerce clause did not prevent a state from prohibiting the sale of a product in that state which is permitted to move in interstate commerce by the federal laws. In this connection this Court said that "when objects of commerce get within the sphere of state legislation, the state may exercise its independent judgment and prohibit what Congress did not see fit to prohibit. When they get within that sphere is determined, as we have said, with the long established criteria." In this case it was held that although Congress may permit an article to move in interstate commerce that a state may prohibit the sale of such article after interstate commerce has come to an end.

In Pacific States Box and Basket Company v. White, 296 U. S. 176, text 184, 56 S. Ct. 159, 80 L. ed. 138, text 145, it was held that the commerce clause of the United States Constitution did not prevent a state prohibiting the use of containers, designed and manufactured for use in packing and transporting raspberries and strawberries, which had come into the stream of interstate commerce and had come to rest therein.

In Weigle v. Curtice Brothers Company, 248 U. S. 285, text 288, 39 S. Ct. 124, 63 L. ed. 242, text 250, this Court remarked that "when objects of commerce get within the sphere of state legislation, the state may exercise its independent judgment and prohibit what Congress did not see fit to forbid.

When they get within that sphere is determined, as we have said, by the long established criteria."

In Packer Corporation v. Utah, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643, text 648, this court said that a statute of Utah prohibiting the use of certain billboards in that state operated "wholly intrastate, beginning after the interstate movement of the poster has ceased."

Although food products may move into the warehouse or pantry of a restaurant or other place of public accommodation in the stream of interstate commerce, when the operator of such restaurant or other place of public accommodation takes such food products and prepares therefrom items of food to be served in such restaurant or other place of public acommodation, such foods cease to be in interstate commerce prior to their service to the customer. Such a restaurant, except those located in railroad stations, bus terminals and air terminals, and the like, and operated primarily for the serving of interstate travelers, is not engaged in interstate commerce.

Although a restaurant owner might purchase his meats in an out-of-state meat packing plant, his chickens and turkeys from another out-of-state producer, his flour, meal, etc., from an out-of-state miller, and other food products from other out-of-state dealers, having the same shipped to his said restaurant by interstate means of transportation, such products come to rest in his place of business before they are there processed and prepared for service to cus-

tomers in the restaurant, so that the sale and service of the same in the said restaurant would not constitute or be transactions in interstate commerce.

There would seem to be little distinction between the person operating the said restaurant and a person engaged in the operation of an ordinary motor vehicle gasoline and oil station, where such person purchases his gasoline, oil and other products from wholesalers, distributors, etc., which products are stored in the tanks and containers of the station operator for retail sale as and when customers appear and request to make purchases of said products.

From the above and foregoing we must conclude that the provisions of Titles II and III of the federal Civil Rights Act of 1964, the same being Public Law 88-352, relating to discrimination in places of public accommodation by the operators of such places, is not authorized by the provisions of Section 8, Article I, of the United States Constitution, relating to commerce with foreign nations, among the states and with Indian Tribes, except insofar as such places are operated in connection with some business, such as a railroad, bus line, or an air line, or other public transportation business, *having a direct connection with* interstate transportation. Businesses having nothing more than an incidental connection with interstate transportation, such as a restaurant serving the public generally which not be engaged in interstate commerce within the purview and intention of the commerce clause of the United States may at uncertain times serve an interstate traveler, would Constitution. Unless the facts in the cause show that the

Heart of Atlanta Motel, Inc., a corporation, is actually engaging in interstate commerce, or that its operation directly affects interstate commerce, then it is not subject to federal legislation based on the commerce clause of the United States Constitution. From the record before this court there appears to be no legal basis, on the facts and circumstances shown, for applying the Civil Rights Act of 1964, its operation not being within either the Fourteenth Amendment to the United States Constitution, or the Commerce clause of the said Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, FRED M. BURNS, Assistant Attorney General of Florida, one of the Attorneys for the State of Florida, and member of the Bar of the Supreme Court of the United States, hereby certify that on September 22, 1964, I served copies of the foregoing Amicus Curiae Brief of the State of Florida on each of the following parties and persons by depositing said copies in a United States Post Office or mail box, with first class or air mail postage prepaid and addressed as follows:

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